

SHOSHONE HIGHWAY DISTRICT #2

IBLA 79-475

Decided January 23, 1980

Appeal from decision denying application to renew free use permit for material site. Idaho FU 9-005.

Vacated and remanded.

1. Materials Act

Where a State Highway District is denied renewal of a free use permit for a material site because a portion of the land has been enclosed within the boundary of a proposed wilderness study area, the decision will not be sustained absent a showing that the denial is supported by overriding considerations of public interest.

APPEARANCES: Roger Maxwell, Secretary-Treasurer, Shoshone, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

By his decision of May 14, 1979, the District Manager of the Shoshone, Idaho, District Office of the Bureau of Land Management (BLM), denied the application of Shoshone Highway District #2 for free use of dirt from a material site in the NW 1/4 SW 1/4 sec. 20, T. 3 S., R. 18 E., Boise meridian, Lincoln County, Idaho. From that decision the Highway District has brought this appeal.

The record shows that BLM had previously granted a free use permit to the Highway District for this same land, which permit expired on October 6, 1978, with no work having been done. The Highway District promptly filed application for a new permit, which was denied by the decision cited above.

The reason for denial of the application by BLM is that a portion of the 40-acre permit area (apparently about 18 acres) has been included within the boundary of the Black Butte Wilderness Inventory

Unit, a proposed wilderness study area. Following the issuance of the decision denying the permit, a memorandum was placed in the file by a geologist employed in the BLM district office. This memo states:

Free Use Application FU 9-005 was denied as the subject lands are included in the Black Butte proposed wilderness study area.

Other factors that were considered, although not officially cited in the Decision follow:

- 1) Adverse visual impact:
 - a) The site is immediately adjacent to the Buck Lake Road.
 - b) The area is thickly vegetated with sagebrush-the normal rehabilitative seeding of wheatgrass would result in a high visual contrast.
- 2) The site is within two miles of an active sage grouse strutting ground.
- 3) Assuming an average depth of one yard of dirt, the area north of the road (approximately 10 acres of usable dirt) could provide 50,000 cubic yard of material (maximum), which is only 1/2 of the applied for amount.
- 4) The fact that the area was included in the proposed wilderness study area (whether or not it is included in the final WSA) suggests that it has value as a natural area - and that environmental impacts should be carefully considered for the site.

There is no evidence in the record that these additional "factors" which influenced the decision were ever communicated to the Highway District so that it could address them on appeal. Thus, BLM left appellant at a considerable disadvantage.

In its statement of reasons for appeal the Highway District makes the following assertions:

1. The dirt is needed for construction of a new road (Burmah Road) that will be used by the general public.
2. The cost to haul dirt from another area if found, would be more expensive not only in money but also in gasoline in which we are trying to conserve.
3. We feel the removal of dirt in the above described area would not harm the environment but would in fact create a water hole for wildlife use.

4. The reason for not removing dirt prior to October 6, 1978 was due to obtaining funding and approval from the Department of Transportation for the construction of a new road. The required paper work and etc. was not completed until after the above date.

In addition to these arguments, this Board is concerned by the configuration of the proposed material site relative to the Black Butte proposed wilderness study area. The southern boundary of the defined Black Butte area is Buck Lake Road, which runs through the NW 1/4 SW 1/4 of sec. 20 diagonally from about the northwest corner of the subdivision to its approximate southeast corner, more or less evenly bisecting the site. All the land north of this highway right of way is included within the Black Butte study area. That part of the quarter-quarter section which lies south of the road was not included, presumably because if it were, the area could not be described as "roadless," so as to qualify under the wilderness criteria. We also note that the entire area of the Black Butte unit contains only 4,002 acres allegedly having wilderness characteristics, including those lands adjacent on the north to Buck Lake Road.

It is apparent that there are certain benefits to the public interest to be derived from granting appellant's application. It is less apparent that the retention of that fraction of the 40-acre tract which lies north of the road carries with it sufficient off-setting benefits to justify BLM's denial of appellant's application on the basis of BLM's recently published "Interim Guidelines." ^{1/} Without being judgmental, we question whether the "visual impact" of wheatgrass in place of sagebrush would be so severe in this small area as to justify rejection, and, if so, whether rehabilitation of the site might not utilize some other cover. Similarly, we are obliged to wonder if it is reasonable to anticipate that utilization of this site would disturb the activity of sage grouse on a strutting ground 2 miles distant. Perhaps the answer would be influenced by intervening terrain features, timber and other vegetation, and/or prevailing winds. As noted above, appellant has not been given the opportunity to address these questions. Moreover, why it was necessary to deny the permit for lands lying south of Buck Lake Road which are not in the defined Black Butte area, is nowhere explained in the record.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to the

^{1/} In this context we agree with Judge Thompson's analysis of the effect of the recently published "Interim Management Policy Guidelines for Lands Under Wilderness Review," as set forth in her separate concurrence.

Shoshone District Office of the Bureau of Land Management for an expeditious readjudication of appellant's application consistent with this opinion.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

The BLM decision in this case was issued on May 14, 1979. After that time, on December 12, 1979, at 44 FR 72013, the BLM's "Interim Management Policy and Guidelines for Lands Under Wilderness Review" was published. This policy statement sets forth the essential criteria which must govern consideration of any application for use of resources in lands designated as a proposed wilderness study area. Chapter III, J-6, of the statement specifically provides: "Sale and free use of mineral materials will be allowed so long as the operation can be conducted consistent with the nonimpairment criteria." Discussion and implementation of the "nonimpairment criteria" are set forth in the Introduction to the statement and at Chapter II, B-2. Among other matters, these criteria include a use of a temporary nature and that any impact of that use must be capable of being reclaimed to a condition of "being substantially unnoticeable in the wilderness study area as a whole by the time the Secretary is scheduled to send his recommendations on that area to the President." The statement also indicates that BLM field officials should cooperate with applicants to help identify ways by which a proposal can be brought into compliance with the nonimpairment standard whenever possible.

Because this interim policy has now been approved, I concur in the remand to BLM for this reason so that it may reconsider the application in light of the policy statement, including cooperation with the applicant to determine if the nonimpairment standard can be met. If after consultation with the applicant, BLM finds that the application should be rejected because the use would not meet the criteria set forth in the interim policy statement, the record should contain sufficient information to support that finding.

Joan B. Thompson
Administrative Judge

